



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUL 16 2013

George Szigeti, President
Hawai'i Lodging & Tourism Association
2270 Kalakaua Ave., Suite 1506
Honolulu, HI 96815

RE: MUR 6607

Dear Mr. Szigeti,

On July 19, 2012, the Federal Election Commission ("Commission") notified the Hawai'i Lodging & Tourism Association ("HLTA") of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to HLTA at that time.

Upon further review of the allegations contained in the complaint and information provided by HLTA, on July 9, 2013, the Commission found that there is no reason to believe that HLTA violated 2 U.S.C. § 441b(a) with respect to Muliufi F. "Mufi" Hannemann's salary and press coverage. Also on that date, the Commission voted to dismiss the allegations that HLTA violated 2 U.S.C. § 441b(a) with respect to travel expenses and coordinated communications. Accordingly, the Commission closed its file in this matter. The Factual and Legal Analysis, which explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). If you have any questions, please contact Margaret Howell, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in dark ink, appearing to read "Mark D. Shonkwiler".

Mark D. Shonkwiler
Assistant General Counsel

Enclosure:
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Hawai'i Lodging &
Tourism Association

MUR: 6607

I. GENERATION OF MATTER

This matter was generated by a complaint filed by Tulsi Gabbard. *See* 2 U.S.C.
§ 437(g)(a)(1).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

The Hawai'i Lodging & Tourism Association ("HLTA") is a "non-profit, statewide trade organization of lodging properties, lodging owners and management firms, suppliers, and related firms and individuals." HLTA Resp. at 1 (Aug. 8, 2012). Its mission is to "provide advocacy and education for the hospitality industry." *Id.* It incorporated as a non-profit corporation in 1947, and is registered with the Internal Revenue Service ("IRS") as a section 501(c)(6) association. *See* Hawaii Department of Commerce and Consumer Affairs; 2009 IRS Form 990.¹

Muliufi F. "Mufi" Hannemann was the president and CEO of HLTA from January 2011 until his resignation, effective July 8, 2012. He was also an unsuccessful candidate in the August 11, 2012, Hawaii primary election for the Democratic nomination for the state's Second Congressional District. His principal campaign committee is Hannemann for Congress, and Colin Ching is its current treasurer (collectively, the "Committee"). Hannemann and the Committee filed Statements of Candidacy and Organization on September 6, 2011.

¹ Before October 1, 2011, HLTA conducted business under the name "Hawai'i Hotel & Lodging Association." Accordingly, its 2009 Form 990 was filed under this name.

1 The Complaint's allegations concern the period during which Hannemann was both a
2 federal candidate and president and CEO of HLTA, and fall into two relevant categories:
3 (1) travel; and (2) HTLA activities and salary.

4 1. Travel

5 The Complaint alleges that the Committee violated the Federal Election Campaign Act of
6 1971, as amended, (the "Act") by failing to report expenditures for campaign travel. Hannemann
7 traveled extensively during the period when he was both a congressional candidate and the
8 president and CEO of HLTA. HLTA states that "[Hannemann's] duties and goals required that
9 he travel frequently to each of the state's islands for a variety of purposes." HLTA Resp. at 1.

10 On September 15, 2011, the Committee sent an e-mail to its supporters stating that, "over
11 the past few weeks, our campaign has traveled to every county of the state" ² Compl. ¶ 5,
12 Ex. A. The Committee did not disclose any disbursements for travel on its 2011 October
13 Quarterly Report, and the Committee disclosed what the Complaint asserts are only some of its
14 travel disbursements on its 2011 Year End Report. See 2011 October Quarterly Report; 2011
15 Year End Report; Compl. ¶ 6.

16 2. HLTA Activities and Salary

17 During the period in which he was both a federal candidate and the paid president and
18 CEO of HLTA, Hannemann appeared as an HLTA spokesman: (1) on Channel 9's "Hawaii
19 News Now" morning shows, on a regular basis; (2) in televised public service announcements
20 ("PSAs") paid for by HLTA; and (3) in a full-page advertisement in the *Honolulu Star-*

² Around the same time, various news sources and Hannemann's personal Twitter account, <https://twitter.com/MuffHannemann>, began reporting on Hannemann's intra-state travel. For example, on August 23, 2011, the *Hawaii Tribune-Herald* reported that "former Honolulu Mayor Muff Hannemann" was in attendance at "a political event" in Hilo, and on September 16, 2011, the *Garden Island News* reported that Hannemann "distributed checks to non-profits on Kauai." Compl. Ex. C. (listing contemporaneous press and twitter references to travel). Hannemann's personal Twitter account details his travel to events such as the Hawaii County Fair (Sept. 17, 2011) and the Molokai Christmas Lights Parade (Dec. 3, 2011). *Id.*

1 *Advertiser* on July 6, 2012, promoting the "Visitor Industry Charity Walk." Compl. ¶¶ 9-10,
2 Ex. I. The Complaint alleges that these appearances resulted in the Committee accepting
3 prohibited corporate contributions from HLTA. Compl. ¶¶ 9-10. HLTA responds that, as the
4 president and CEO of HLTA, Hannemann was "charged with . . . serving as an advocate and
5 spokesman for the lodging and visitor industries [and] communicating our mission and goals to
6 the general public." HLTA Resp. at 1.

7 The Complaint also alleges that HLTA's payment of Hannemann's salary while he was
8 "campaigning full-time" constitutes a prohibited corporate contribution from HLTA, speculating
9 that Hannemann was "certainly not working the same number of hours." Compl. ¶ 9. In
10 response, HLTA asserts this allegation is not supported by any facts. HLTA Resp. at 2.
11 According to HLTA, "as far as the HLTA Board of Directors is concerned, Mr. Hannemann did
12 an exceptional job as president and CEO throughout his 16-month tenure. He never failed to
13 fulfill his responsibilities and worked tirelessly on HLTA business affairs" *Id.*

14 **B. Legal Analysis**

15 A "contribution" includes any gift, subscription, loan, advance, or deposit of money or
16 anything of value made by any person for the purpose of influencing a federal election. 2 U.S.C.
17 § 431(8). Commission regulations define "anything of value" to include in-kind contributions,
18 including the provision of goods or services without charge or at a charge that is less than the
19 usual and normal charge for such goods or services. 11 C.F.R. § 100.52(d). It is unlawful for
20 any corporation to make a contribution in connection with any election to any federal office, and
21 unlawful for any political committee knowingly to accept such a contribution. 2 U.S.C.
22 § 441b(a).

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1 1. Travel

2 Candidate travel that combines campaign activity with business activities not related to
3 the campaign and personal activities ("mixed use travel") is subject to Commission regulations
4 regarding both the personal use of campaign funds and expense allocation.

5 In cases where travel involves both personal and campaign activities, Commission
6 regulations on personal use provide that the incremental expenses that result from personal
7 activities are personal use, unless the person benefitting from the use reimburses the campaign
8 account within 30 days for the amount of the incremental expenses. 11 C.F.R.
9 § 113.1(g)(1)(ii)(C).

10 The Commission historically has considered the costs of airfare to travel to a single
11 location for mixed use to be "a defined expense" and not subject to the incremental expense
12 approach. *See* Advisory Op. 2002-05 (Hutchinson) at 5; Factual & Legal Analysis at 5,
13 MUR 6127 (Obama for America). Applying 2 U.S.C. § 439a(b), the Commission has assessed
14 whether the expense would have occurred irrespective of the candidate's campaign to determine
15 whether airfare should be paid in full from personal or campaign funds. *See* F&LA, MUR 6127
16 (concluding that, because the President's travel to Hawaii would have occurred irrespective of
17 the campaign, he should have reimbursed his campaign for the airfare under § 439a(b));
18 Advisory Op. 2002-05 (concluding that the airfare of an official traveling for business, personal,
19 and campaign reasons would have occurred irrespective of any campaign activity and therefore
20 none of the airfare must be paid for by the campaign). *But see* Advisory Op. 2011-02 (Brown)
21 (Commission did not reach agreement on whether a candidate's publisher could pay the travel
22 costs for the candidate to both promote his book and hold fundraisers in the same city).

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1 The statements posted on Hannemann's Twitter account — both cited in the Complaint
2 and others — paint a picture of Hannemann attending numerous events across the state in
3 support of the tourism industry, ranging from county fairs to birthday parties to the various
4 islands' HLTA-sponsored charity walks. *See generally* <https://twitter.com/MufiHannemann>;
5 Compl., Ex. C. Notwithstanding the Committee's September 15, 2011, e-mail, it appears that the
6 travel detailed in the referenced media sources would have occurred irrespective of
7 Hannemann's campaign. Although the *Hawaii Tribune* article cited in Complaint Exhibit C
8 references Hannemann attending a "political event in Hilo," there is no information that
9 Hannemann attended this event on behalf of his campaign rather than in his capacity as a party
10 leader and the former mayor of Honolulu. Similarly, the *Garden Island* article cited in the
11 Complaint detailing Hannemann's distribution of checks to local non-profits explains that
12 Hannemann was distributing funds raised by HLTA's 2011 Charity Walk.

13 Where Hannemann's Twitter account does suggest campaign-related travel — for
14 example, a tweet about a campaign kick-off event at the Jailhouse Pub and Grill in Kauai on
15 November 14, 2011 — it appears that the Committee disclosed the related disbursements: its
16 2011 Year End Report discloses a \$187.41 disbursement for inter-island travel on November 13,
17 2011, and a disbursement of \$613.21 to Jailhouse Pub on November 14, 2011.

18 In sum, the public contemporaneous diary that Hannemann maintained as his Twitter
19 account supports a reasonable inference that Hannemann's campaign activity was merely
20 incidental to his business obligations during most of his inter-island travel. It also appears that
21 the travel involving significant campaign activity was disclosed on the relevant disclosure
22 reports. Although not all of the details of Hannemann's travel schedule from September 6, 2011,
23 to July 8, 2012, are available, the available information suggests that the travel not disclosed by

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1 the Committee would have occurred irrespective of Hannemann's candidacy, and therefore did
2 not need to be funded or reported by the Committee.

3 A definitive conclusion would require a detailed investigation into the booking and
4 scheduling of Hannemann's travel; however, such an investigation does not appear warranted in
5 light of the available information and the Commission's limited resources. Therefore, the
6 Commission dismissed the allegation that HLTA violated 2 U.S.C. § 441b(a) by making a
7 corporate contribution in the form of Hannemann's travel.

8 2. HLTA Activities and Salary

9 a. News Show Appearances

10 Hannemann's appearances on Channel 9's "Hawaii News Now" morning shows were not
11 paid for by HLTA. Commission regulations exempt from the definition of "contribution" any
12 costs incurred in covering or carrying a news story, commentary, or editorial by any broadcasting
13 station, unless the facility is owned or controlled by any political party, political committee, or
14 candidate. 11 C.F.R. § 100.73. The Commission conducts a two-step analysis to determine
15 whether this "press exemption" applies in a given situation: (1) it asks if the entity is a press
16 entity as described by the Act and regulations; and (2) it asks whether the press entity is owned
17 or controlled by a political party, political committee, or candidate, and, if not, whether the press
18 entity is acting as a press entity in conducting the activity at issue (whether it is acting in its
19 "legitimate press function"). *See* Advisory Op. 2005-16 (Fired Up!); *Reader's Digest*
20 *Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

21 In this matter, it appears that Channel 9's "Hawaii News Now" morning show is a
22 legitimate press entity acting in its legitimate press function; it is a broadcast station that does not
23 appear to be owned by any political party or committee, and its YouTube clips feature its

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1 broadcasters interviewing various political figures, including Hannemann, about Hawaii's
2 tourism and economy. Accordingly, the press exemption applies to Hannemann's appearances
3 on "Hawaii News Now" on behalf of HLTA, and neither Hannemann nor the Committee
4 received a contribution in the form of press coverage on "Hawaii News Now." Therefore, the
5 Commission found no reason to believe that HLTA violated 2 U.S.C. § 441b(a) by making an in-
6 kind corporate contribution in the form of press coverage.

7 b. Coordinated Communications

8 Hannemann appeared in several communications paid for by HLTA. *See supra* pp. 2-3.
9 Expenditures made by any person in cooperation, consultation, or concert with, or at the request
10 or suggestion of a candidate, the candidate's authorized political committee, or their agents, are a
11 contribution to such candidate. 2 U.S.C. § 441a(a)(7)(B). When a person pays for a
12 communication that is coordinated with a candidate or his or her authorized committee, the
13 communication is considered an in-kind contribution from that person to that candidate and is
14 subject to the limits, prohibitions, and reporting requirements of the Act. 11 C.F.R. § 109.21(b).

15 A communication is coordinated with a candidate, authorized committee, or agent thereof
16 if it meets the three-part test set forth in the Commission regulations: (1) it is paid for by a
17 person other than the candidate or authorized committee; (2) it satisfies one of the five content
18 standards in 11 C.F.R. § 109.21(c); and (3) it satisfies one of the conduct standards in 11 C.F.R.
19 § 109.21(d). *Id.* § 109.21(a).

20 Although the Complaint alleges that certain PSAs featuring Hannemann constitute
21 coordinated communications, it does not identify the PSAs or include any information

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1 concerning their timing, subjects, or content in support of this allegation.³ A determination of
2 whether these PSAs satisfy the Commission's test for coordinated communications would
3 require investigation; the conclusory nature of the allegation, however, does not warrant
4 expending Commission resources to conduct such an investigation here.

5 The Complaint also alleges that a specific newspaper advertisement, which featured
6 Hannemann in relation to a charity event sponsored by HLTA, constitutes a coordinated
7 communication under the Commission's regulations. Pursuit of this allegation, however, would
8 not be an efficient use of the Commission's limited resources. The advertisement focuses
9 entirely on a charity event; it does not "pertain[] to [Hannemann] . . . as a candidate." Statement
10 of Reasons, Comm'rs Walther, Petersen, Bauerly, Hunter, McGahn at 5, MUR 6020 (Alliance
11 for Climate Protection) (dismissing allegation of coordination where candidate appeared in a
12 charitable organization's ad that satisfied the content prong of the coordinated communications
13 test.) The ad features a chart of the total number of walkers and money raised on each island's
14 walk, multiple photographs of the participants from each island, and a "Save the Date"
15 announcement for the 2013 Visitor Industry Charity Walk. See Compl., Ex. I. While the
16 advertisement includes a photograph of Hannemann, he is identified only as the "President and
17 CEO" of HLTA, and he is standing between two other individuals who are identified as the
18 charity event's Honorary Chair and Chair. *Id.* Given the philanthropic nature of the
19 advertisement, the Commission dismissed the allegation that HLTA violated 2 U.S.C. § 441b(a)

³ While the Complaint states that the PSAs were "broadcast" and posted on Hannemann's YouTube channel, Facebook page, and Twitter account, a review of these websites reveals only one PSA, posted on all three sites on May 10, 2012, featuring Hanneinana inviting viewers to the 2012 Visitor Industry Charity Walk. See, e.g., <http://www.youtube.com/watch?v=2e7vBh6PnPk&list=UUSAmc2VJmmIOMEf05pDN5sw&index=12>. These internet postings do not constitute "public communications," and therefore do not in themselves satisfy the content prong. See 11 C.F.R. §§ 100.26, 109.21(c)(3). Furthermore, there is no additional evidence that the PSAs were "broadcast" outside these websites.

1 by making a corporate contribution in the form of coordinated communications.⁴ See *Heckler v.*
2 *Chaney*, 470 U.S. 821, 831 (1985).

3 c. Salary

4 Commission regulations provide that compensation paid to a candidate by an employer
5 constitutes a contribution unless such payments are made irrespective of the candidacy, meaning:

- 6 1) the compensation results from *bona fide* employment that is genuinely independent of the
7 candidacy;
8
9 2) the compensation is exclusively in consideration of services provided by the employee as
10 part of this employment; and
11
12 3) the compensation does not exceed the amount of compensation which would be paid to
13 any other similarly qualified person for the same work over the same period of time.
14
15 11 C.F.R. § 113.1(g)(6)(iii).

16 The available information suggests that HLTA paid Hannemann's salary irrespective of
17 his candidacy. Hannemann obtained his position as president and CEO of HLTA approximately
18 eight months before he became a candidate.⁵ HLTA makes specific assertions that Hannemann
19 never failed to fulfill his responsibilities. See *supra* p. 3. Moreover, the Complaint's allegations
20 that Hannemann did not fulfill his duties or provide the services for which he was compensated

⁴ There is not enough information available to determine whether the Commission's safe harbor for commercial transactions that serve non-electoral business and commercial purposes is applicable to this advertisement. See *Coordinated Communications*, 75 Fed. Reg. 55,947, 55,959 (Sep. 15, 2010). That safe harbor covers public communications in which: (1) a federal candidate is clearly identified only in his or her capacity as the owner or operator of a business; (2) the business existed prior to the candidacy; (3) the medium, timing, content, and geographic distribution of the public communication is consistent with public communications made prior to the candidacy; and (4) the public communication does not promote, support, attack, or oppose that candidate or another candidate who seeks the same office. 11 C.F.R. § 109.21(i). Specifically, we do not know whether the ad here "is consistent with public communications made prior to the candidacy." *Id.* In addition, in its 2010 coordinated communications rulemaking, the Commission considered whether to establish a parallel safe harbor for ads run "by certain tax-exempt nonprofit organizations in which Federal candidates and officeholders appear." 75 Fed. Reg. at 55,960. The Commission declined to do so, however, explaining that there "is no significant need" and that the "Commission retains its prosecutorial discretion to dismiss enforcement matters involving such communications." *Id.* (emphasis added).

⁵ See, e.g., Second Gen. Counsel's Rpt. at 11, MUR 5571 (Tanonaka, *et al.*) (Commission took no further action when, among other factors, the contract between the candidate and his employer was ratified more than a year before the candidate announced his candidacy).

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1 are speculative. The allegations are also contradictory, in that they provide evidence of
2 Hannemann's news shows appearances, which indicate that he *was* working on behalf of HLTA
3 while also a candidate. Finally, the Complaint makes no specific allegation that Hannemann's
4 compensation exceeded the amount that would be paid to any other similarly qualified person for
5 the same work. Therefore, the Commission found no reason to believe that HLTA violated
6 2 U.S.C. § 441b(a) by making a corporate contribution in the form of Hannemann's salary.

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